IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

PRESIDING HONORABLE KURTIS T. WILDER, HONORABLE JOEL P. HOEKSTRA AND THE HONORABLE DONALD S. OWENS

ANN and LEE COBLENTZ
JOHN and DEBORAH LEWANDOWSKI,

Plaintiffs/Appellants,

v

Supreme Court No.: 127715
Court of Appeals No.: 255359
Lower Court No.: 03-046760-CZ

CITY OF NOVI,

Defendant/Appellee.

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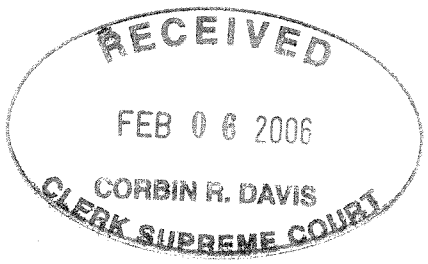
PLAINTIFFS/APPELLANTS' REPLY TO DEFENDANT/APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE



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STATUTES

Defendant/Appellee ("Novi") continually attempts to portray Plaintiffs/Appellants ("Plaintiffs") as individuals bent on suing them for damages, hoping this Court will ignore the applicable law or their actions. It was Novi's actions that resulted in the 70 million dollar judgment. Novi's time restrictions (September 9, 2002) on their "offer" resulted in significant document requests. Novi's refusal to produce requested documentation resulted in this action. Novi's refusal to provide discovery resulted in the litigation continuing against it.

The circumstances of this case should be examined in the context of what actually took place, not Novi's speculation.[1] Given Novi's deadline to make a decision, Plaintiffs' counsel attempted to obtain all available information. Any claim of a "fishing expedition" to further "potential litigation" is speculation and irrelevant.[2] The importance of Plaintiffs' discovery requests and the information they could have revealed has been set forth. The issue for determination is whether Novi complied with the law. Novi disclaimer of operating in a "secretive manner" ignores its choice of the intentional deletion terminology,[3] its claim that exhibits and site plans never existed, change of the term "side agreements" to "side letters," its indication it did not know what the "global" in the settlement agreement it formulated referred to, and its failure to put forth to the citizens any mention of any "side letters" or agreements until after Plaintiffs' FOIA request. Novi's discussion of the Discovery Master's situation is irrelevant. Despite his actions being beyond his

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[1]Despite Novi's speculation, Plaintiffs have filed no litigation either against Sandstone or the City of Novi seeking any money damages to date.

[2]It was Novi who requested a demand to resolve the whole matter to which Plaintiffs responded. (Appellee's Appendix 14b).

[3] During the course of this matter, Novi produced Exhibit ROW. This exhibit is not listed on the list of the exhibits for the agreement. One wonders what document Exhibit ROW is an exhibit to? Plaintiffs were never able to determine this given the preclusion of discovery.

Court ordered authority, Plaintiffs would not have engaged in almost three months of negotiations if Plaintiffs were only seeking litigation against Novi.[4] Even assuming Novi's speculation about Plaintiffs' "motives" were true, that does not justify non-compliance with the law. Any attempt to deflect this Court's attention from the relevant issues should be ignored.

I. THE INTENTIONALLY DELETED EXHIBITS

Novi acknowledges that if the deleted exhibits do exist they would not be exempt under the FOIA. Their only argument is that Plaintiffs never actually requested same. They never address their own attorney's correspondence which indicated the documents "never existed."

The FOIA clearly indicates that if a public body denies a FOIA request because it claims that a record does not exist, the public body must send written notice including a certification that the public record does not exist under the name given by the requester, or by another name reasonably known to the public body. See MCL 15.235(4)(b). Clearly, by enacting this section of the statute, the legislature recognized that the FOIA responder was in the best position to know how documents were known, labeled or in what form they existed. In Herald Co. v Bay City, 463 Mich 111, 614 NW2d 873 (2002), this Court held that a request need not specifically describe the records containing the sought information, but rather, a request for information contained in the records would suffice.

Plaintiffs' request specifically stated that it was for All exhibits, indicating the specifically listed intentionally deleted exhibits for the agreement for entry of the Consent Judgment dated June 25, 2002. There would have been no logical reason to have specifically listed Exhibits G, T, U, V, W, AA, BB, GG, MM, NN and PP in their request, if Plaintiffs only wanted the exhibits to the final

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[4]Counsel for Novi acknowledged to the Trial Court that there was a disagreement over what occurred before the Discovery Master. (Appellants' Appendix 480a). The Order appointing the Discovery Master was in relationship to the discovery issues only. (Appellee's Appendix 17b).

agreement after Novi claimed they "never existed."[5] Words mean things, never means never. It does not mean existed and then discarded. The FOIA requires that the Novi must produce what is requested. If not, they must set forth a recognized exemption for not producing same or a certificate indicating it does not exist. This was not done.

II. GLOBAL READINGS

Novi's argument in regard to the "global readings" ignores two important facts. First, prior to their FOIA request Plaintiffs' requested a copy of the "global" reference. (Appellants' Appendix 100a). In response Novi claimed it did not know what this "global" was. (Appellants' Appendix 101a). Second, after litigation commenced, all discovery in regards to this issue was refused by the Novi and subsequently precluded by the Court's order of August 19, 2003. (Appellants Appendix 2a). If Novi did not know what "global" was, how could Plaintiffs? This response forced Plaintiffs to attempt to guess at what it referred to.[6]

Must Plaintiffs submit innumerable FOIA requests attempting to discover the potential documents "global referencing extra land" referred to? Once discovery was barred, there was absolutely no way Plaintiffs could learn from the persons who produced the document what it concerned. The purpose of discovery is to narrow and clarify issues. Responses to Plaintiffs' discovery requests could have narrowed the issue or allowed Plaintiffs to make a more precise request. FOIA requesters should not be forced to "guess" in order to make a FOIA request. To argue

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[5] The request for these deleted exhibits resulted from the draft agreements that referenced "the extra land" which was determined to be Plaintiffs' property. Novi now admits at p. 21 of their Brief that some of these exhibits may have been created but were later discarded in the process of finalizing the agreement. If this is the case then they did exist at some point.

[6] This was the reason that Plaintiffs, in their November 1, 2002 FOIA request, also asked for all settlement agreements relating to this matter. (Appellee's Appendix 102a).

that Plaintiffs failed to respond with sufficient evidence to create an issue of fact, in light of the Trial Court's ruling effectually eliminating discovery to Plaintiffs, is spurious.

III. SITE PLAN

Plaintiffs requested clarification from Novi by inquiring whether a site or concept plan existed. (Appellants' Appendix 90-91a). Novi responded that neither a site plan or a concept plan existed and never existed. (Appellants' Appendix 93a). This is the same response Novi had given regarding the intentionally deleted exhibits which proved to be untrue. (Appellants' Appendix 94a). As this matter progressed, the land behind Plaintiffs' property was razed. Novi would have this Court assume that this was done without some type of a "site" plan being set forth. They now admit that some type of "grading plan" does or did exist. However at the time of the request, there was no way for Plaintiffs to know what any plan was called as Novi had advised that no such items existed or were in the "public record." (Appellants' Appendix 86a). Novi was in possession of the information regarding how items were designated, named or in what form or manner they existed. Since discovery was completely precluded by the Trial Court's August 19, 2003 Order, Plaintiffs were forced to provide the only evidence they could, photographs of what was going on. Speculation as to "fishing expeditions" or Plaintiffs' motives are irrelevant to the issue of compliance with the law.[7] Novi's citation to MCL 15.240(5) is misplaced. The purpose of this section is to prevent undo delay in obtaining a quick determination as to what must be produced. This supports the FOIA's stated public policy recognizing the need citizens to be informed so they hold public officials

[7]Novi argues that Plaintiffs failed to articulate the reasons for taking such depositions at the time of the Motion for Protective Order heard on August 13, 2003. The Court transcript clearly indicates that the Court stopped Mr. Rossi's presentation and held a bench conference. (Appellants' Appendix 482a). The Court record also clearly indicates that Novi asked for a protective order to keep any discovery from occurring prior to the summary disposition motion. (Appellants' Appendix 481a).

accountable for the manner in which they discharge their duties. See Thomas v City of New Baltimore, 254 Mich App 196, 656 NW2d 530 (2003). Plaintiffs' request sought complete information regarding the affairs of their government and elected officials in its dealings with Sandstone involving their property.

The reasons and rationale for discovery in FOIA litigation set forth in Hammond Bay, Federated Publications and MCR 2.302 indicate open and fair discovery should be the underpinning of every FOIA litigation. Only then, can the purposes of the FOIA be upheld.[8] The cases cited by Novi discuss "limiting" discovery. In this case, the Trial Court did not limit discovery, it prohibited it altogether.

IV. SIDE LETTERS

Novi's argument fails to appreciate the distinction between the **development** of governmental policy and the **implementation** of that policy. Novi appears to argue is that the settlement agreement reached on June 25, 2002 was not the final agreement. If so, Novi never indicates what changed. Novi has never produced an amended settlement agreement or any other document indicating that the "determinations" set forth in the June 25, 2002 agreement changed in anyway after that date. The "side letters," at best, can only be considered mechanisms for implementing the agreement, not changing same. As of June 25, 2005 when the agreement was executed, the determination had already been made if the deed restrictions could not be cleared, additional park land would have to be turned over to Sandstone. (Appellants' Appendix 27a-28a).

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[8]Novi asks this Court to embrace a "core purpose doctrine." A core purpose analysis is unnecessary as the Michigan legislature's policy determination is expressly set forth in the statute. MCL 15.231(2) states that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees consistent with this act. (*Emphasis added*).

Accordingly, any "governmental policy decision" regarding this scenario was decided before and completed by June 25, 2002. Beyond that date, the only consideration left was how this "policy"[9] was to be implemented. If the "side letters" were submitted and agreed to after June 25, 2002, they could not have been submitted for the development of any governmental policy.[10]

At p. 36 of their Brief, Novi alleges two governmental policies. Avoidance of bankruptcy by the City and the manner in which the City should attempt to clear the deed restrictions. Bankruptcy by the City was no longer an issue once the agreement was reached. (See Appellants' Brief on Appeal at p. 27). Further, the City had already determined that if the deed restrictions were not waived, additional park property would be forfeited to Sandstone. This "decision" was incorporated in the June 25, 2002 agreement. As such, the "side letters" could only concern the implementation of this decision.[11] The deliberations to reach the decision to forfeit additional park land must have taken place prior to the execution of the agreement on June 25, 2002. Otherwise, why was that contingency set forth in the agreement? The fact that the agreement specifically deals with that scenario evidences that any "policy" decision was considered and decided upon prior to the agreement's execution. As such, if the "letters" are dated after June 25, 2002, there can be no doubt

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[9] Plaintiffs dispute whether the resolution of the Sandstone matter even constitutes a development of a governmental policy as contemplated by the FOIA. See Herald Co. set forth in Plaintiffs' Brief on Appeal.

[10] Even if the letters are dated before June 25, 2002, they clearly appear to involve only implementation of what had been set forth in the agreement.

[11] The "side letters" apparently indicated how Sandstone wanted the City to get the restrictions released Utilizing the previous analogy set forth by Plaintiffs' if a governmental entity determines that it "policy" is to lower speeds of vehicles the means to effectuate same would include posting lower speed limits or increasing police enforcement of existing traffic laws. The means of effectuating such a policy are separate and distinct from the development of the policy itself.

they were not submitted for the development of any policy alleged by Novi.[12]

V. UPON A PROMISE OF CONFIDENTIALITY

Novi attempts to meld the two "side letters" into one by arguing that the second letter is inseparable from the first. This is an interesting argument for which Novi presents no basis other then to argue they cover the same issue. One of the letters apparently contains absolutely no confidentiality assertion. The language of the statute is clear that the promise of confidentiality must occur at or before an item is submitted. Confidentiality agreed to after submission or upon one party's assertion of confidentiality does not comply with the law. The November 15, 2002 correspondence Mr. Carson affirms Sandstone's position that all of the 'letters" were confidential and contained proprietary information. (Appellee's Appendix 40b). If the letters were submitted upon a promise of confidentiality by the chief administrative officer or elected official, why was there any need to inquire as to Sandstone's position on the confidentiality in November, 2002. At p. 41 of their Brief, Novi claims that the "side letters" were "examined by the City Council in executive session." They do not say when this session occurred. [13] Accordingly, if they were examined in executive session after receipt whereupon the City made the determination to agree to confidentiality, the letters could not have been submitted upon a promise of confidentiality as the FOIA requires. Likewise, if the Mayor signed the letters after submission, then the FOIA was not complied with. Plaintiffs were precluded by the Court Order of August 19, 2003 from obtaining any discovery in regard to this issue. Since no discovery was allowed on this issue, the Trial Court could

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[12]Novi's citation to the Open Meetings Act is inapplicable, because it appears that no meeting, vote or other official City action was taken regarding in regard to the "side letters." Further, the Open Meetings Act does not define public policy.

[13]Novi never provided any minutes, voting record, documentation or evidence from the City indicating that the issue of confidentiality was agreed to before submission.

not make the particularized findings required by the Nicitia and Evening News cases. [14]

VI. REASONABLE TIME

It appears that the Novi's argument is that because it negotiated whether the "side letters" would remain confidential, it could delay compliance with the reasonable time requirement set forth in the statute. This ignores what occurred. Assuming there was a determination at some point that these "letters" were to be confidential,[15] the FOIA requires information regarding same to have been placed on file within a reasonable time thereafter. Novi cannot have it both ways. If a confidentiality determination was made before the letters were apparently submitted in July, 2002,[16] there was no reason not to have placed the information regarding the description of the "letters" on file within a short period after that. If, on the other hand, confidentiality was not determined until November, 2002, (as appears by the correspondence submitted by Novi), then the "letters" could not have been submitted upon a promise of confidentiality. Negotiation regarding whether the "letters" could be produced is irrelevant the to requirement of the law. Apparently, the "letters' existed at some point well before November, 2002. No reason has been proffered by Novi why a description of these "letters", if deemed confidential prior to their submission, could not have been placed on file shortly after submission. Either the "letters" were confidential or they were not. If they were not, they should have been made public. The reality is that the filing was done in a last minute

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[14] The Hughes Affidavit was submitted after the Court's order precluding discovery. Plaintiffs had no opportunity to cross examine Mr. Hughes or the Mayor. There was no Affidavit from the City Manager or Mayor indicating when the confidentiality was promised and by what process it was obtained.

[15]Novi argues based on the Hughes' Affidavit is the "side letters" were submitted upon a promise of confidentiality and claim at p. 41 of their Brief that at the time they were considered confidential.

[16] Plaintiffs have never seen the 'letters", but surmise the date of same based on the time sequences involved and the other "letters" that were produced.

attempt to comply with the FOIA after Plaintiffs' FOIA request.

VII. PARTICULARIZED REASONS

The Nicita and Evening News cases set forth a specific methodology for resolving exemption issues. Plaintiffs have clearly set out the particularized findings that should have been provided by Novi and then by the Trial Court. Mere recitation of the statute as done by Novi is insufficient in response to a FOIA request and does not meet the requirements of the law. [17]

VIII. ATTORNEY FEES

Novi now claims that the $150.00 fee which Plaintiffs were charged was not an attorney fee but was for the separation of exempt for non-exempt" material.[18] (Novi's Brief at pp. 46 & 48). Interestingly, this is not the argument presented to the Trial Court or to the Court of Appeals. The bill submitted by Novi already contained a separate charge for separation of exempt material in the amount of $17.26. (Appellants' Appendix 116a). Novi's bill indicates a $150.00 charge is for "payment covering a portion from City Attorney to search, examine and review materials for FOIA request item 1." If a $150.00 fee was for the separation of exempt from non-exempt material then why was there a separate "actual labor cost" charge in the amount of $17.26? Novi's argument whether the involvement of an attorney was necessary is irrelevant. Had the legislature deemed an attorney fee appropriate for responding to an FOIA request it would be set forth in the act. Novi's attempt to "rename" this charge should not be allowed. The Court of Appeal's legislation of such a fee into the Act should be overturned.

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[17] It is interesting to note that Novi apparently realizing the Courts' Order was deficient, attempted to submit their own order setting forth the particularized findings required by the FOIA. The Trial Court entered its own Order. (Appellants' Appendix 5a-6a).

[18] Here again, Novi attempts to relabel something.

IX. OUTSIDE ATTORNEY AS EMPLOYEE OF PUBLIC BODY

The Evidentiary Hearing testimony indicated Mr. Fisher was an "independent contractor" and that he did not receive any paychecks as an employee or other benefits from the City.[19] (Appellants' Appendix 406a). Novi's attempt to diminish the ramifications of the Coblentz ruling by claiming that each and every assessment of fees requires a fact based review is misplaced. Under Coblentz there is no barrier to an attorney fee being charged to a requester. An independent contract attorney can be considered the lowest paid public body employee capable of responding to a FOIA request. This is not in the FOIA and is nothing more than Court enacted legislation. The FOIA statute uses the language of the lowest paid body employee not the lowest paid person or independent contractor. Novi claims that this case presents an "outlier" set of facts. There is nothing in the Coblentz decision that limits its application to particularized types of requests. A governmental entity can always articulate some reason for having an attorney involved in any FOIA determination and then charge the requester. This will severely limit access to documentation. Only those requesters who can afford to pay such fees will be able to access certain information. This undermines the public policy set forth by the legislature at MCL 15.231(2) and should be disallowed.

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Dated: February 3, 2006

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[19] Plaintiffs suggested referring to MCL 418.161 for the reason that 418.161 codified the test for the determining whether an individual is an employee or an independent contractor. See MCL 418.161(n). Ms.Cornelius testified Mr. Fisher was an "independent contract attorney" for the City of Novi. (Appellants' Appendix 406a-407a).